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No. 94-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHESAPEAKE BAY FOUNDATION, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY IN SUPPORT OF CERTIORARI

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The question in this case is whether, in a Freedom of Information Act case that is resolved prior to a ruling on the merits, a district court must, at the attorney's fees stage, determine whether the government would have won the case on the merits, and deny fees if it answers that question affirmatively. As demonstrated in the Petition, this holding is at odds with decisions of other courts of appeals, cannot be squared with decisions of this Court interpreting similar fee-shifting statutes, and would seriously impede the settlement of FOIA cases.

The government responds to the Petition as if this were a routine case, in which the court of appeals simply told the district court to consider, but not treat as dispositive, the merits of the underlying action. But that is not what happened here. Rather, the decision of the court of appeals mandates that all FOIA litigation resolved short of a decision on the merits must still be decided on the merits and all fees denied if the court determines that plaintiff would not have prevailed had the case been litigated to judgment.

1. As we noted in the Petition (at 4), if the court of appeals had simply ruled that this case should be remanded to consider whether respondent's withholding had a reasonable basis, we would not have sought review in this Court. Under the prevailing case law, the district court must consider the reasonable basis factor along with, at a minimum, the other three factors discussed in FOIA's legislative history. But that is not what the court of appeals held; rather, on three separate occasions, the court stated, in no uncertain terms, that if "the Government's position is legally correct ... this will be dispositive of the" fee application (10a).[1]

At the end of its Statement of the Case, respondent acknowledges, ever so subtly, that the court of appeals' ruling requires that fees be denied if, after settling the merits, the government can show that it would have prevailed on the merits. Opp. 5 ("If [the documents] were in fact exempt from disclosure under FOIA, the court of appeals concluded that 'no fees are recoverable'"). Thereafter, however, respondent does not confront the actual holding below and repeatedly asserts, without citation, that the court of appeals remanded the case simply "to consider" another factor not addressed by the district court. Opp. 5. *See also id.* at 7 ("The court of appeals determined that ... an additional factor should be *considered*"); 7-8 ("the court of appeals appropriately directed the district court *to consider* an additional factor ..."); 9 ("nothing in the language or legislative history of FOIA's fee provision precludes a court ... *from considering* whether the information released was covered by FOIA ...")(emphasis added).

Only by ignoring the clear language of the ruling below, and claiming that the court of appeals merely added another nondispositive factor to the exercise of the district court's discretion, can respondent argue that the court of appeals' approach is "unexceptionable" and not in conflict with other courts of appeals. Opp. 6. But as explained in the Petition, the ruling of

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[1] *See also* 9a ("[T]here can be no doubt that a party is not entitled to fees if the Government's basis for withholding requested records is correct"); 10a ("If the Government was right in claiming that the data were exempt from disclosure under FOIA, then no fees are recoverable").

the court of appeals is plainly inconsistent with cases such as *Crooker v. United States Parole Comm'n*, 776 F.2d 366, 369 (1st Cir. 1985), which held that "[o]ne factor alone is not dispositive," even where the government's withholding of the documents concededly was not unreasonable, and *Local 598 v. Dep't of the Army Corps of Engineers*, 841 F.2d 1459, 1462-64 (9th Cir. 1988), and *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978), which held that it is an abuse of discretion if the district court fails to consider all four factors cited in FOIA's legislative history. *See also* Pet. 10 n.5 (citing cases from other circuits to the same effect). Thus, by requiring the district court to decide the merits of settled FOIA cases, and to deny fees if the court finds that the documents were properly withheld, the court of appeals has plainly parted company with its sister circuits.[2]

2. Without citation (Opp. 7), respondent attempts to undercut the broad impact of the decision below by claiming that "[i]n the typical FOIA fee litigation, FOIA fees are sought only after the government has lost a suit on the merits ... ." In the experience of undersigned counsel, whose office has litigated over 200 FOIA suits, there is simply no basis for this statement. As in other litigation, many FOIA cases settle, and thereafter the parties turn to the issue of fees. Thus, in many FOIA cases, the court of appeals' ruling will greatly complicate resolution of the fee dispute in a way that Congress never intended, by reintroducing the merits in otherwise resolved cases.

In this regard, the government makes only a half-hearted attempt to counter the argument that the D.C. Circuit's approach is at odds with national policies favoring settlement. The

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[2] Respondent claims that its position is somehow strengthened because "no decision ... awards fees under FOIA for obtaining documents excluded from FOIA's provisions." Opp. 8. This proves far too much, and thus nothing at all. Naturally, when a plaintiff loses on the merits, he or she has not "substantially prevailed" under 5 U.S.C. § 552(a)(4)(E), and therefore is not eligible for a fee. On the other hand, whenever documents are disclosed through settlement, the merits will, by definition, not be resolved. Thus, the question whether fees can be awarded to someone who was not legally entitled to the documents has never been decided, prior to the unprecedented ruling of the court of appeals here.

government does not dispute that early settlements of the merits may be greatly reduced because such settlements would make it difficult, if not impossible, for the plaintiff to gain adequate information to prove his or her case at the fee stage. Pet. 14-15. Nor does respondent contest that the court of appeals' ruling will make FOIA fee disputes much more time-consuming and complex for the parties and the judiciary alike. Pet. 15.

The government's only response on the question of settlement is limited to one point that falters because of its erroneous factual premise. Respondent maintains that settlements will actually be encouraged by the decision below because otherwise "FOIA fee awards [would be] *routinely available* once information is released, even if that information is not subject to FOIA ... ." Opp. 9 (emphasis added). But existing law does not make FOIA fees "routinely available" in settled cases. Rather, in order to be entitled to fees in such cases, the district court must assess all relevant factors, including the reasonableness of the government's position, without assigning any one factor dispositive weight. *See, e.g., Crooker, supra.* Because the court of appeals has added a new factor, which, if decided in the government's favor, *is* dispositive, it is the impact of the decision below, and not the existing scheme embraced by the other courts of appeals, that will make settlement more difficult.

3. Finally, respondent has mischaracterized petitioner's citation to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). EAJA requires the courts to consider whether the government's position was "substantially justified," *id.* § 2412(d)(1)(A), *i.e.*, reasonable, *see Pierce v. Underwood*, 487 U.S. 552, 560-61 (1988), but a ruling under EAJA, as respondent notes, "does not generally involve a definitive determination of the merits of the case." Opp. 9. That is the point. Under EAJA, a statute in which Congress has expressly required some analysis of the merits, the court need not issue a conclusive ruling on the merits of settled cases. *A fortiori,* Congress did not want the courts to make such rulings in settled cases under FOIA, where the fee provision does not even mention the reasonableness of the government's position on the merits, and the legislative history does not permit any one factor to be dispositive.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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